

Political Divorce of Peoples:  
A Search for a Right to Secession in International Law and Normative  
International Relations Theory

BY

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Justice Hoover Randolph

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degree of Master of Arts.

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## **Abstract**

This thesis looks at the problem of secession in international relations. An opening section defines secession, exposes hypocrisy on this issue, and makes a case for the significance of the issue. Next, I turn to a search for answers to three closely related questions on the right to secession. First I ask, what is the status of a right to secession in international law? I frame my search around the right to self-determination and find that, while a right to self-determination does still exist in international law, it no longer contains a sub-right to secession or independence. Next I look for a right to secession in normative international relations theory: what normative theories of a right to secession have normative international relations theorists developed. I find four distinct categories, provide examples, and arrange them on an ideological continuum. In my concluding chapter, I look at the various issues and concerns that one would need to take into account to develop a feasible and complete right to secession, with attention to what is politically possible at the international level.

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## Chapter 1 – A Right to Sovereignty

For all the disagreements among nations, it seems that all nations can agree on two key things. First, all just states have a right to sovereignty, which loosely means that all nations have an equal right to do as they see fit within their territory and other nations must respect each other's territorial integrity. And second, that the international community's primary goal should be the promotion of peace and security among nations. Both are enshrined in the UN Charter and elsewhere in international law and are often cited in the rhetoric of the international community.<sup>1</sup>

But what happens when these two goals contradict each other, as they do when a non-state group unilaterally declares independence and is suppressed by the host state? The short answer is, people die – at least until the international community can decide which goal is more important in that particular case. The death toll range of these independence movements is huge: 3,000 in Morocco, 32,000 in Cameroon, 310,000 in the break-up of Yugoslavia as nation after nation declared independence, all the way up to 1,000,000 in Algeria.<sup>2</sup>

In the modern international system, a unilateral declaration of independence nearly always means conflict and usually war. But, does it have to? In the chapters to follow, I search for a right to secession of these non-state groups. I ask – and seek

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<sup>1</sup> By “international community” I mean the community of states, international organizations, and other non-state organizations who participate in politics at the international level.

<sup>2</sup> Milton Leitenberg, “Deaths in Wars and Conflicts in the 20th Century” <http://www.cissm.umd.edu/papers/files/deathswarsconflictsjune52006.pdf> (last accessed January 3, 2013). I picked Leitenberg's numbers because his methodology struck me as conservative, yet more holistic than the “battle-related death” limitations other datasets use.

answers for – three closely related questions. (1) What is the status of a right to secession in international law? (2) What theories of a right to secession have normative international relations (IR) theorists developed? (3) What should a path forward look like?

I begin, however, with this introductory chapter. I will define some of my key terms and in so doing, set up the scope and parameters of this project. Next, I trace the genesis of modern secession, noting important hypocrisy early in modern secession's history. Then, I make the case that this is an international issue, preempting the possible critique that this is an issue best solved individually by the states. I conclude this chapter by previewing the coming chapters and by delineating what I think are this work's contributions.

## **Definitions**

Before I go any further, I need to define a couple terms that will have significant influence over what this work is, and is not. By secession, I mean complete political, economic, and military separation of two or more groups of people, where the non-state group forms a new, independent, and sovereign state. I do not mean autonomy within a state, where certain state functions are still performed by the host state. Likewise, I do not mean revolution, though the two are often equated and both are forms of intrastate conflict. Unlike secession, revolution is a challenge of a government's claim to authority. Secession is merely a challenge to a state's claim to exercise sovereignty over a particular territory or people. As one theorist points out, "the secessionist does not deny the state's authority as such,

but only its authority over her and the other members of her group and the territory they occupy.”<sup>3</sup>

I also need a way to distinguish the various groups involved in a secessionary debate or conflict. By ‘non-state group’ I mean the ethnic, political, or otherwise distinguishable group that is seeking secession and statehood. “Separatists” is the more commonly used term, but I feel that it comes with prejudicial connotations. And by ‘host-state’ I mean the internationally recognized state from which the non-state group is seeking secession. Let me use an example to illustrate. If Scotland is seeking secession from the United Kingdom, then the Scottish are the non-state group and the UK is the host-state, represented by the official government of the UK.

### **The Modern Genesis of Secession**

The modern history of secession can be traced back to the summer of 1776, when fifty-six Britons signed a letter to King George III of Great Britain announcing their political, economic, and military independence and new status as a sovereign nation. It was the first such declaration of separation since the Peace of Westphalia developed our modern understanding of a right to sovereignty: it was unprecedented.

While much of the actual American Declaration of Independence is spent cataloging the colonists’ specific grievances against the British Crown, their fundamental and more universal argument can be boiled down to a couple lines. “To secure these [universal, God-given] rights, governments are instituted among men, deriving their just powers from the consent of the governed [and] whenever

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<sup>3</sup> Allen Buchanan, “Toward a Theory of Secession,” *Ethics* 101, no. 2 (1991): 326.



any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government..."<sup>4</sup> Nearing the end of the document they conclude, "We, therefore, ... by authority of the good people of these colonies, solemnly publish and declare that these United Colonies are, and of right ought to be free and independent states."<sup>5</sup>

The signers of the US Declaration of Independence ask the question, 'do they, as a group of people, have a right to secession?' Their answer is two-part. First, they find that sovereignty is a right belonging to the people governed, not a government. And second, since sovereignty derives from the governed, they have a right to withdraw their consent to be governed and institute a new government: that is, there is a right to secede. While this first finding seems universal, it is unclear what, if any, preconditions the separatists believed needed to be met for a people to justly withdraw their consent and secede. However, it is clear that the American colonists did believe that they had a right and just cause to secede from the British Empire. King George III disagreed.

In 1783, after years of violent confrontation, British and American representatives met in Paris and signed a peace treaty. The Treaty of Paris gave the Americans exactly what they had asked for in their Declaration of Independence, complete freedom and independence for each of the thirteen signatory North American colonies: each colony had won its independence.

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<sup>4</sup> US Declaration of Independence (note: I modernized and standardized the syntax for reading ease).

<sup>5</sup> US Declaration of Independence (note: I modernized and standardized the syntax for reading ease).

The American Revolutionaries had successfully defended the lofty language of the Declaration of Independence. Through bloody battles and generally miserable living conditions, the soldiers of the American Revolution had defended those two key findings: sovereignty is a right of the people to be governed and, since sovereignty derives from the governed, people have a right to secede.

But, strangely no precedent seems to have been set by American independence, even the American position lacked consistency in the years that followed. In 1860, another non-state group attempted to declare independence, this time *from* the United States. While the Confederate States of America never wrote a single unified declaration of independence, South Carolina, Mississippi, Texas, and Georgia all wrote declarations of independence.<sup>6</sup> The case presented in South Carolina's "Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union," parallels the arguments in the 1776 declaration quite closely. Like the 1776 declaration, South Carolina's 1860 declaration lists the grievances that lead to its dissatisfaction with the "Federal Union." But, more importantly, the writers directly reference the key findings of the original declaration of independence, "thus were established [by the Treaty of Paris, 1783] the two great principles asserted by the Colonies [in the US Declaration of Independence], namely: the right of a State to govern itself; and the right of a people to abolish a Government when it becomes destructive of the ends for which it was

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<sup>6</sup> Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union" [avalon.law.yale.edu/19th\\_century/csa\\_scarsec.asp](http://avalon.law.yale.edu/19th_century/csa_scarsec.asp) (last accessed December 27, 2012).

instituted.”<sup>7</sup> Finding that the United States Government has failed to live up to its obligations to the people of South Carolina, the signers suggest a third principle is also found in the 1776 Declaration of Independence: the law of compact, which holds that if one party violates the terms of a compact (contractual obligation), then the other party(ies) are not bound to it either.<sup>8</sup> Thus, because the sovereignty derives from the people and they can withdraw it at anytime, and because the United States has failed its contractual obligations to South Carolina (and the larger South), South Carolina has a right to secede from the Union. The Lincoln Administration and the members of the House and Senate did not agree. It seems that, for them, the right to secession was not universal (if they believed it existed at all) and the South did not have a legitimate claim to a right to secede.

This inconsistency is not the end of the United States’ inability to take a consistent stance on this question of whether geographically contiguous non-states can declare independence. Not even a generation after the American Civil War, the United State found itself involved in new independence struggles: Cuba, Texas, and California just to name a few in close proximity. American history is rife with inconsistency on this issue and the US has supported and worked against various independence movements around the world, seemingly with little consistency. Even more recently, the US supported the independence of Bosnia and Kosovo, but seemed ambivalent towards Tibet and one *Washington Post* columnist described American policy towards Chechnya as “two-faced,” suggesting that different

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<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

agencies within the Bush Administration could not even develop a consistent policy for this single case.<sup>9</sup>

In short, even the United States seems inconsistent on this issue, despite the claims of a right to secession found in its key founding documents. While no two events are the same, it is interesting to note this hypocrisy. And, I find myself asking why that is.

In all fairness, the question, 'do non-states have a right to secession?,' is a question that nearly all established nations must ask continuously and on which few nations seem able to establish a consistent stance. It can easily be suggested that the reason behind this inconsistency is that states support secession and independence only when it is in their own self-interest. There is certainly some evidence to this assertion. I could end the discussion of this problem here, but I fear this answer's cynicism works to upstage other possible answers and even hurts itself by preventing further exploration of how states can get away with such inconsistency. The question deserves further exploration.

Ignoring the cynical reasons for this disconnect that are often thrown around, perhaps what makes this question so difficult are all the issues hidden within the main question. Included in this large question are a plethora of other, sub-questions that need an answer. For example, what is sovereignty; what is a state and what is a non-state? What does it mean to have a right in international relations/international law; and from where do any rights derive? What sort of criteria need be met for a territory to justly exercise that right to sovereignty; is

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<sup>9</sup> Anne Applebaum, "Two-Faced Chechnya Policy," *Washington Post*, June 30, 2004.

there a minimum support threshold that needs to be met? What role should various actors play in disputes of this nature?

### **Is This Even an International Issue?**

Perhaps the first question that needs answering is whether this is an international issue or a domestic issue, best resolved at the state level. One could make the case, and many nations have, that issues of secession, separation, and independence are issues of a domestic nature since the debate necessarily centers on disagreements between internal actors. However, this argument has some key flaws.

Recent examples show that this type of conflict very often develops a violent component. The Uppsala *Armed Conflict Database* lists 37 ongoing conflicts in the 2011 calendar year.<sup>10</sup> Twenty-seven of those conflicts were intrastate, meaning a “conflict that occurs between the government of a state and one or more internal opposition group(s).”<sup>11</sup> Nine of those conflicts were “internationalized,” which is defined as conflict that “occurs between the government of a state and one or more internal opposition groups with intervention from other states on one or both sides.”<sup>12</sup> In the simplest terms, 36 of these 37 conflicts can be described as intrastate, since they share this basic government/opposition group dyad

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<sup>10</sup> Uppsala Conflict Data Program, “Homepage,” Uppsala University Department of Peace and Conflict Research, <[http://www.pcr.uu.se/research/ucdp/datasets/ucdp\\_prio\\_armed\\_conflict\\_dataset/](http://www.pcr.uu.se/research/ucdp/datasets/ucdp_prio_armed_conflict_dataset/)> (last accessed April 6, 2013).

<sup>11</sup> Uppsala Conflict Data Program, “UCDP/PRIO Armed Conflict Dataset Codebook” Version 4-2012, [http://www.pcr.uu.se/digitalAssets/118/118670\\_codebook\\_ucdp\\_prio-armed-conflict-dataset-v4\\_2012.pdf](http://www.pcr.uu.se/digitalAssets/118/118670_codebook_ucdp_prio-armed-conflict-dataset-v4_2012.pdf) (last accessed April 6, 2013): 9.

<sup>12</sup> Ibid., 9.

component. The single remaining conflict is described as interstate. As I suggested earlier, there seem to be two types of intrastate warfare: secessions and revolutions. It is not difficult to imagine that of the 37 ongoing world conflicts, 36 of them relate in some way to this question posed by the US Declaration of Independence: from where does sovereignty derive. Furthermore, a significant subset of those conflicts directly ask questions about whether and how a non-state achieves independence and statehood, and whether there is a right to secession for these groups.

When these secessionary conflicts turn violent, they can likely lead to a whole host of other, related international issues. Refugees and externally displaced people become an issue as people flee the danger posed by an escalating conflict. Migration – especially the rapid and large-scale migration often created by refugees – poses a serious security threat to the region surrounding the conflict. Refugees can be major economic, political, and social burdens on the state providing sanctuary.

Additionally, one of the incidental differences between secession and revolution is the nationalistic component that is often found in secession, which revolutions usually lack. History has shown that these non-state groups who are ethnic minorities sometimes become victims of ethnic cleansing and genocide campaigns. In fact, as impetus for establishing the Responsibility to Protect, the International Commission on Intervention and State Sovereignty cited four recent cases of international failure in the face of genocide; two of the four were the result

of conflicts that started as independence movements.<sup>13</sup> While international action in the face of genocide has been haphazard at best, genocide prevention, and punishments for acts of genocide, are well developed in international law and politics.<sup>14</sup>

For an international community that values peace, the issue of secession is an important issue in-and-of itself. The international nature of this issue is further reinforced by the practice and rhetoric of the United Nations. Rhetorically speaking, the UN leadership and many of its documents speak of a right to the “self-determination” of peoples (explored more fully in Chapter 2) and of protecting the political, social, and economic rights of individuals. But, the UN acts, not just rhetorically, but in practice too. In practice, the UN quite often finds itself compelled to approve, fund, and run peacekeeping missions in areas where independence conflict has torn a nation apart, now in increasingly intrusive and holistic ways.<sup>15</sup>

But, even if internal UN politics prevents a UN response, sympathetic nations can and do still act and work to the benefit of one side. Outside the UN system, nations have tools like economic and political sanctions, arms and military supplies,

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<sup>13</sup> International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, (Ottawa, Canada: International Development Research Centre, 2001), 1.

<sup>14</sup> The 1948 Genocide Convention defines and establishes the illegality of genocide and the international community has formed various courts to punish it: Nuremberg Military Tribunals, International Criminal Tribunal for the Former Yugoslavia, International Criminal Tribunal for Rwanda, and now cases of genocide are handled by the International Criminal Court.

<sup>15</sup> Paul F. Diehl and Daniel Druckman, *Evaluating Peace Operations* (Boulder, CO: Reinner, 2010). Diehl and Druckman provide a through discussion of non-traditional peacekeeping.

and selective humanitarian aid they can use to support a favored side and oppose the other.

In short, while it is possible to view the debate over a specific secession as a domestic issue, experience has shown that the resulting conflict often makes it an international issue. And, even if there is no conflict, and the host-state simply allows the secession, the act of creating a new state is necessarily an international relations issue too.

### **Concluding Thoughts and Next Steps**

So far, I have argued the importance of this issue. Secession movements have the potential to bring about a lot of negative consequences. Early in this chapter, I cited casualty figures from four conflicts to highlight the range of casualties that we have seen resulting from declarations of independence (ranging from 3,000 to one million), however those four cases are just a small sampling of a much larger issue. The loss of life from independence struggles around this world is large and tragic.

In addition to the military *and civilian* loss of life that results from any war, unilateral declarations of independence often carry another potential loss of life scenario: ethnic cleansing and genocide. Often independence movements are nationalistically based (the Kurds in the Middle East, Kosovo, Bosnia, Slovenia, Croatia in the former Yugoslavia, the Basques in Spain and France). For these reasons, I firmly believe this is an important issue.

This project continues in two substantive chapters. In the next chapter, I will trace secession in international law via the right to self-determination. Beginning with early conceptions of Wilsonian self-determination, and continuing to the status



of that right today, I find that while a right to self-determination still exists, a right to secession does not.

In the third chapter, I will address the important scholarly perspectives of what a right to secession should or might look like. Combining systems developed by two scholars, working from different perspectives, I catalogue and categorize the perspectives and writers. I will also compare and contrast the points of view, exploring their strengths and weaknesses.

It is my hope that this project will contribute three things to the field. First, to my knowledge no work on this topic has covered the issue in the interdisciplinary way I hope to in this work. From my reading, there are two separate ongoing conversations: one in international law scholarship and another in normative IR theory. At the very least, this work engages each subfield and brings their perspectives into a single, unified work. Second, to my knowledge, no work has yet tried to organize the normative perspectives in a truly non-partisan manner. Those works that do organize the perspectives seem to do so in order to strike down several authors in one fell swoop. Here, I have sought to engage each perspective with objectivity and fairness. Finally, while I try to remain objective in the third chapter, I do plan to contribute something more unique to the normative literature. In the final chapter, I offer a few additional thoughts on what a right to secession should look like and I try to address criticisms of my perspective in new ways.

## Chapter 2 – Secession in International Law

Even accepting my argument from the previous chapter that, secession is an international issue, it may seem strange to include a chapter on international law in a thesis searching for a right to secession. To some, international law seems only concerned with the interactions of states. And true, for many international courts and organizations, states are the only actors that matter. However, things may not be quite so black and white; I think two important counter points go a long way toward justifying a search for a right to secession in international law.

First, while much of international law is only really concerned with how states treat each other, some laws now exist that deal with how states treat their own people, and they have existed for a while. Perhaps one of the earliest examples is the Genocide Convention (1948).<sup>16</sup> Here, the international community renders illegal a whole class of actions previously available to a state, theoretically available at least. In the Genocide Convention, the international community declares how a state cannot treat the people within its borders. Admittedly this is an extreme example and a couple other examples can also be found: most notably, the International Bill of Human Rights.<sup>17</sup>

The second point is that the nature of legal personhood seems to have changed a little, too. One example is the International Criminal Court, which confers legal personhood on individuals in its mission to enforce international legal statutes

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<sup>16</sup> “Genocide Convention,” December 9, 1948, available at <<http://www.hrweb.org/legal/genocide.html>> (last accessed April 12, 2013).

<sup>17</sup> Though, it should be noted that as will all treaties, each state must voluntarily sign and ratify these treaties for them to take effect.

condemning genocide, crimes against humanity, war crimes, and crimes of aggression.<sup>18</sup> It seems then, that international law is not solely concerned with the interactions of states, but does have a few treaties and laws that impact how a state conducts itself within its own boundaries.

Even if international law does sometime work within the state, protecting people against their government, what would drive the international community to create law on this particular topic? To answer that I return to a couple points I made in Chapter One. An important goal of international law seems to be promoting peace and stability in the world. As I argued in the previous chapter, secession can dramatically undermine those goals. A secessionary debate that devolves can lead to civil war and genocide, and can create large numbers of refugees very quickly. All these are things the international community seeks to avoid and often things the international community feels compelled to respond to with interventions. It would make sense for international law to contain some procedure for a right to secession in an effort to mitigate those consequences. This chapter is a search for a right to secession in international law.

There seems to be just a few ways to gain independence in international law. A non-state could fight for and win independence from the host state, as the United States did.<sup>19</sup> A non-state can push for referenda on secession, as South Sudan recently did. A non-state can quietly leave during the implosion of the host state, as Somaliland effectively has. A non-state could have its independence viewed as

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<sup>18</sup> "Rome Statute of the International Criminal Courts," November 10, 1998, available at <<http://untreaty.un.org/cod/icc/statute/romeofra.htm>> (last accessed April 12, 2013).

<sup>19</sup> Though, the legality of this path is dubious.

politically expedient, as happened with Belgium. However, these paths are either too violent or unworkable in many cases. The other option is for a non-state to find its right to secession through the right to self-determination.

This chapter specifically looks for a right to secession in the right to self-determination. Self-determination offers a few strengths these other paths lack. First, self-determination is accessible; all peoples have a right to self-determination as per international law: self-determination applies in more than just a handful of cases – I will explore that momentarily. Second, the right to self-determination is well established in international law. And third, many states have actually used self-determination to secede successfully.

This chapter continues in two parts. First, I trace the origin and evolution of self-determination. However, as we will see, self-determination does not seem be the legal foundation of future secession and independence movements. Therefore, I conclude with a look at the current state of secession and independence in international law.

## **What is Self-Determination?<sup>20</sup>**

*Self-determination is the idea that a given people should be able to ‘determine’ their government.* At its core, it is the idea that people should have a say in who governs them and under what terms they are to be governed. There is a problem though. For the purposes of international law, this definition of self-determination

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<sup>20</sup> The sections of this paper on Self-Determination and the Kosovo decision are adapted from a paper written for a Directed Readings course I completed in the fall of 2012 with Mariya Omelicheva. The course largely focused on International Humanitarian Law. The original paper was entitled “Self-Determination, Secession, and Kosovo’s Struggle for Independence.”

is vague: it seems to raise more questions than it answers. What is a people: one, ten, fifty-thousand; do they need to share a culture, language, or religion? What does it actually mean to determine your government: vote in free/fair elections or write a new constitution for a whole new state? I could have written a definition that answered these questions and pre-empted others, but perversely, it would have actually been more incomplete.

As I will demonstrate, the concept of self-determination has gone through an interesting evolution. Over time, self-determination has been used to justify many related actions, which “include, but are not limited to, secession, freedom from colonial domination, integration with an existing state, limited autonomy within a state, and protection of minority groups.”<sup>21</sup> The problem with my definition is that it is vague and actually leads to two separate understandings of what self-determination means: external and internal self-determination. Internal self-determination is the right to pursue “political, economic, social, and cultural development *within the framework of an existing state* (emphasis in the original)” with external being the older understanding that necessitates independence to realize those goals.<sup>22</sup> The external right to self-determination closely mirrors a right to secession. But as I will show, the right to self-determination has been reinterpreted along the lines of an internal right most recently.

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<sup>21</sup> Amy Maguire, “Law Protecting Rights: Restoring the law of self-determination in the neo-colonial world,” *Law Text Culture* vol. 12 (2008): 15.

<sup>22</sup> Mauro Barelli, “Shaping Indigenous Self-Determination: Promising or Unsatisfactory Solutions?,” *International Community Law Review* 13 (2011): 415; Maguire, 27.

## World War One and Wilsonian Self-Determination

Much changed in the field of international relations following the First World War. Key among the changes was the rapid development of international law. The level of violence and bloodshed witnessed during the war appalled Western leaders. An unchecked system of exclusive bilateral treaties had created two alarmingly powerful sides and sparked a messy world war. Multilateral international law (a system of non-exclusive universal treaties) seemed like a better way forward: a way to create a single world order and unite the global powers. As a symbol of that single side and new unity, the League of Nations was created and the world signed onto a new set of rules.<sup>23</sup>

But, just meeting periodically in Geneva was not quite enough. For the Allied Powers, creating a single world order also meant breaking up the antagonistic “multi-ethnic empires:” namely the Austro-Hungarian and Ottoman Empires. To that end, this ‘right of self-determination’ enters the Western lexicon.

Many scholars trace the roots of modern self-determination to Woodrow Wilson. One author even suggests that Woodrow Wilson coined the term “self-determination.”<sup>24</sup> As Wilson understood self-determination, it was “a scheme whereby *identifiable people were to be accorded Statehood*; the fate of disputed border areas was to be decided by the plebiscite; and those ethnic groups too small

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<sup>23</sup> Though the concept of “international law” certainly predates WWI, the scope and strength of international law increased substantially in the aftermath of the war.

<sup>24</sup> Marija Batistich, “The Right to Self-Determination and International Law,” *Auckland University Law Review* (1992): 1016.

or too dispersed...were to benefit from the protection of minority regimes, supervised by...the League of Nations.”<sup>25</sup>

The logic behind this move is very political and apparent. By breaking up these large empires, Wilson and the other victorious leaders hoped that the defeated empires would be too weak to rise again and restart war, hoping for a more favorable conclusion. By framing the division these empires in terms of a right to self-determination for their peoples, Wilson and the other leaders attempted to cloak their actions. “The political separation of ethnic minorities was perceived by the allies as a convenient way of dissecting the European territories of the conquered.”<sup>26</sup> That is, they were not arbitrarily breaking up a once-great empire as an act of retribution; but rather, they were helping these peoples realize a right that these vanquished empires had long denied them: a right to self-determine; a right to secession and independence. Following World War One, self-determination meant independence for many nations formerly part of the Austro-Hungarian and Ottoman Empires.

While the creation of this right helped establish a justification for redrawing the maps of Europe and the Near East, a couple key things remain important to keep in mind. First, while self-determination remains a very vague term, it manages to acquire a specific connotation. Probably owing to the way Wilson describes “self-determination” and the way it was practiced, it becomes closely associated with independence. This is key because the language of self-determination will dominate

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<sup>25</sup> Batistich. Emphasis Added.

<sup>26</sup> Batistich, 1016.

the debate in international law about how non-states gain independence for decades following.

Second, this new right to self-determination is not a codified part of international law at this point. Again, it serves as a rhetorical justification for a policy of dividing the defeated powers after World War One. It does not get built into and is specifically excluded from the framework of the League of Nations and its Covenant.<sup>27</sup> It is little more than a moral justification for breaking up the Austro-Hungarian and Ottoman Empires following the close of the First World War: specific language for talking points.<sup>28</sup>

Almost immediately questions arise about whether self-determination includes a right to independence.<sup>29</sup> Even in this post-World War One era, the issue of independence (and any guarantee thereof) is tricky in international politics and law; non-states are non-states because someone does not want them to be states. And, true independence always requires that other states – particularly powerful states – recognize your independence as well. At this point, this is not a problem, because, as discussed above, while self-determination is understood rhetorically as a right, there is no language in the international legal framework guaranteeing the right. But, despite (or perhaps because of) Wilson's splitting up of those empires, war reignites in Europe and this League of Nations system is torn apart. The future of self-determination becomes unclear.

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<sup>27</sup> Batistich.

<sup>28</sup> Batistich.

<sup>29</sup> Batistich.



## Self-Determination in the UN System

While the League of Nations Covenant intentionally ignores self-determination, it appears twice in the UN Charter. The UN Charter begins with a list of purposes for the organization and the second one on the list is as follows, “to develop friendly relations among nations based on respect for the principle of equal rights and *self-determination of peoples*, and to take other appropriate measures to strengthen universal peace.”<sup>30</sup> Self-determination’s second appearance in the Charter comes in the chapter on economic and social co-operation: “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and *self-determination of peoples*, the United Nations shall promote...”<sup>31</sup>

Self-determination does appear in these two rhetorically significant places, it seems to be a concept that is meant to be an important part of the UN’s mandate. However, there are a few important problems with its use in the UN Charter, all relating the vagueness with which it is used. First, it is not clear if self-determination is intended to be a right, a principle, or something else entirely. It simply seems as though the UN framers think self-determination is a good idea and want to foster whatever it is around the world. The second problem with self-determination’s use in the UN Charter is that self-determination is left undefined.<sup>32</sup>

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<sup>30</sup> United Nations, The. *Charter of the United Nations*. San Francisco, 26 June 1945, art. 1, sec. 2. Emphasis added.

<sup>31</sup> UN Charter, art. 55. Again, emphasis added.

<sup>32</sup> Batishich, 1018.

Third, to whom this self-determination belongs remains undefined and unclear as well.<sup>33</sup>

So, while this right of self-determination seems to become more important after World War Two, it actually remains largely in the same position. Before and after World War Two it is vague and unclear. Though, as with self-determination's use before World War Two, it seems to remain connotatively connected to this idea of independence. But, much was left up to future generations to interpret and shape.

As the UN developed, so too did this idea of self-determination, now written into international law via its inclusion in the UN Charter. Over the years, the idea of self-determination was incorporated into various documents. Part I, Article 1, of both twin covenants reads as follows.<sup>34</sup> "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."<sup>35</sup> This use of self-determination is interesting for two reasons. First, the language suggests that self-determination is necessary for the development of a whole host of things, which the UN seeks to promote. Secondly, this language is interesting because it is pulled, nearly verbatim, from an earlier UN document, the 1960 General Assembly Resolution 1514, *Declaration on the Granting of Independence to Colonial Countries and Peoples*. Theoretically, this inclusion of language from Res. 1514 in a more

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<sup>33</sup> Batishich.

<sup>34</sup> By "twin covenants" I mean the UN Covenant on Civil and Political Rights and the UN Covenant on Economic, Social, and Cultural Rights.

<sup>35</sup> UN Covenant on Civil and Political Rights; UN Covenant on Economic, Social, and Cultural Rights.

universal set of documents is interesting because it would seem to extend the privileges of 1514 to peoples not colonized.

In practice, however, self-determination continued to evolve along a more restrictive path than the above discussion would imply. Just as the rhetoric of self-determination was important in granting independence to nations once ruled by the Ottoman and Austro-Hungarian empires following the First World War, self-determination became an important part of granting independence to former colonies following the Second World War. “During the era of decolonisation, the United Nations defined self-determination as the right to be free from colonial domination” and that right to self-determine entailed a right to independence.<sup>36</sup> This right to secede from the colonial power was often largely uncontested, as colonialism had outlived its usefulness by the middle of the twentieth century. Or, as one scholar (referencing the rhetoric of the twin covenants and, perhaps looking through rosier glasses) put it, “the international community determined that colonialism impeded the enjoyment of human rights” and needed to be a concluded chapter of history.<sup>37</sup>

Regardless of the reason behind it, the number of post-colonial states grew in the General Assembly and so too did support for the right to self-determination.<sup>38</sup> In 1960, the UN General Assembly adopted Resolution 1514, a declaration on colonies and the independence process, which I have addressed a bit. Resolution 1514 takes a firm stand in its affirmation of self-determination, “All peoples have the right to

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<sup>36</sup> Batistich, 1023.

<sup>37</sup> Batistich, 1024.

<sup>38</sup> Batistich, 1025.

self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>39</sup> There are a couple key points to make here. First, the resolution clearly establishes self-determination as a right, a departure from the amorphous nature of self-determination as found in the UN Charter.<sup>40</sup> Second, it offers a definition of self-determination, reinforcing that self-determination is a right to pursue economic, social, and cultural development. Finally and perhaps most importantly, the resolution sets up self-determination as a right to freely determine “political status.” Is this the right to secession and ticket to independence through international law for which we have been looking?

Maybe, but some limitations certainly still exist. As one scholar notes, “The United Nations Declaration [on the Granting of Independence to Colonial Countries and Peoples] recognised a right of secession not for ‘peoples’ at all, but for those territories that happened to be recognised by the United Nations as colonies.”<sup>41</sup> Accepting this, and accepting that the period of decolonization is largely concluded, the logical question to ask is how does self-determination evolve in a post-colonial world and what is it now.

In an article published in *Human Rights Quarterly* a few years back, Jan Klabbers looks at self-determination in the courts from 1970 to the present day. His findings are important because they shed light not only on the status of self-

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<sup>39</sup> UNGA, Resolution 1514

<sup>40</sup> However, the universality is debatable. On one hand, it uses the words “all peoples,” but on the other, the document is pretty clear that it is a document on decolonialization.

<sup>41</sup> Batistich, 1025.

determination today, but also how this chapter of its history has played out.

Klabbers notes that the judicial arm of the UN, the International Court of Justice (ICJ), has heard four cases where self-determinism was a potential issue during those 30-odd years and he further finds that the ICJ's ruling on those cases has been significant in two key ways.<sup>42</sup>

First, with the exception of the first ruling, the ICJ's decisions consistently refer to self-determination as a *principle* – though at times both ‘principle’ and ‘right’ have been used in the same decision.<sup>43</sup> This is important because principles carry less weight than rights in international law. And second, the ICJ has let each opportunity to comment extensively on self-determination pass quietly. Klabbers also notes towards the end of his discussion that other courts and tribunals have also been asked to rule on matters of self-determination periodically. He finds that they have worked against a robust self-determinism too, but in a different way. While the ICJ has worked to undermine self-determination's status as an international legal right, other judicial bodies have worked to sever the connection between self-determination and secession or independence, suggesting the a right to self-determine is not a right to secede.<sup>44</sup>

Klabbers continues, since the 1970s judicial and quasi-judicial bodies have “reconceptualized the right to self-determination to come to terms with the (virtual)

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<sup>42</sup> Klabbers, 197.

The four cases in question are Namibia 1971, Western Sahara 1975, The Frontier Dispute 1986, & East Timor 1995. The ICJ's ruling on Kosovo was written after this article and will be addressed separately.

<sup>43</sup> Jan Klabbers, “The Right to be Taken Seriously; Self-Determination in International Law,” *Human Rights Quarterly* 28(2006): 197.

<sup>44</sup> Klabbers, 197-8.

end of decolonialization. Now that self-determination can no longer simply be construed as a right of colonies to independence, it has evolved into a right of peoples to take part in decisions affecting their future.”<sup>45</sup> That is, there is a shift from external to internal self-determination. The right to self-determination is no longer connected to independence or secession; rather it is a political right that can be exercised *within* the host state. “Beyond the decolonisation context, the nationalist component of self-determination is completely absorbed into the sovereignty of existing states. By reducing the principle of self-determination of peoples to the political and civil rights of individuals, the inference is made that even decolonisation was a right only in so far as it was instrumental in securing individual political and civil rights.”<sup>46</sup> Remember, this idea was suggested by the twin covenants.

By reducing the right to self-determination to “a right to be heard” (to borrow Klabber’s words) it takes on a democratizing effect, too. Citing another, Klabber sums up the current state of self-determination nicely.

“Indeed, as Martti Koskenniemi has pointed out, there are essentially two versions of self-determination, competing with each other and eventually lapsing into each other. There is a ‘good’ version of self-determination that appeals to one’s democratic instincts and sense of fairness, and there is a less benign version which appeals to our nationalistic, isolationist, exclusionary instincts. In the end, self-determination ‘both supports and challenges statehood,’ and one is unable to consistently apply a right to self-determination precisely because one cannot distinguish, much less choose, between the two.”<sup>47</sup>

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<sup>45</sup> Klabbers, 189.

<sup>46</sup> Batistich, 1026.

<sup>47</sup> Klabbers, 188.

Other authors describe this as the difference between “internal and external” understandings of self-determination.<sup>48</sup>

So then, today we are left with a broken right to self-determination. It certainly seems to be a part of international law: its rhetoric is in the UN Charter and several key UN documents. It does exist and is important. However, it is broken in that it seems to mean whatever it needs to mean in the moment. International law – any law for that matter – can either be flexible or protect and defend rights: it cannot be both.

Despite the efforts of many, a right to secession is not built into the right of self-determination. Rather, in the modern context, self-determination has come to mean democracy and representation. The value, at least for states playing politics, is that by keeping self-determination in limbo, they can more easily ignore a non-state’s claim to the right to self-determine when necessary.<sup>49</sup>

### **Self-Determination in the New Millennium**

Peoples seeking independence have begun to pick up on this ambiguity of self-determination. The language of self-determination seems to be used less and less in conjunction with secession and independence. Kosovo provides a great example. The writers of the Kosovo Declaration of Independence had clearly done their homework. They seemed to be aware that the right to self-determination argument no longer held a right to secession and independence. The word, “self-

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<sup>48</sup> Barelli, 415; Maguire, 27.

<sup>49</sup> Saul, 612.

determination,” appears nowhere in the *Kosovo Declaration of Independence*.<sup>50</sup> Nowhere. In fact, the Kosovo declaration does not even use any of the rhetoric of self-determination. They do not justify their secession in terms of being a distinct people and culture from Serbia or the rest of the former Yugoslavia.<sup>51</sup> And, the declaration makes no mention of concentration of Kosovars in a distinct region of Serbia.<sup>52</sup> The argument ignores all the key criteria previously necessary to build a case for independence through self-determination. Instead, the declaration talks about how the disagreements between Serbia and Kosovo are unsolvable and continued political union unworkable.<sup>53</sup> It is an argument based in pragmatism and safety, not lofty language of rights and duties.

Predictably, Kosovo’s unilateral declaration of independence was immediately challenged by Serbia and the ICJ was given another opportunity to rule on matters of secession and independence, via a referral of this issue from the UN General Assembly. When the ICJ finally returned a decision, the news media seemed to hail it as a boon for peoples seeking independence everywhere. The media’s take on the decision was that the ICJ had upheld Kosovo’s right to secede, unilaterally from Serbia, potentially ending decades of war and conflict in the region. But did they really?

The UN General Assembly had asked the ICJ for a decision on the question “Is the unilateral declaration of independence by the Provisional Institutions of Self-

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<sup>50</sup> Provisional Government of Kosovo, *Kosovo Declaration of Independence*, Pristina, 17 February, 2008.

<sup>51</sup> *Kosovo Declaration of Independence*.

<sup>52</sup> *Kosovo Declaration of Independence*.

<sup>53</sup> *Kosovo Declaration of Independence*.



Government (PISG) of Kosovo in accordance with international law?”<sup>54</sup> It is important to note the vagueness of this question, as several scholars have pointed out.<sup>55</sup> One article lists 10 distinct ways to interpret that question, each on a very different aspect of law and leading to a very different answer.<sup>56</sup> Some of these possible options include, “Did international law confer upon Kosovo (or the people thereof) a right to secede? Did international law require Kosovo to refrain from seceding? ... What was the legal effect of the purported secession? Was it successful?”<sup>57</sup> Above, we established that self-determination clearly does not hold a right to independence at this point in time. But, interpreting the question in any one of these three ways would have given the ICJ an opportunity to rule on the legality of secession and establish precedent. The ICJ had plenty of opportunity to determine whether a non-state has a right to secede under international law independent of any right to self-determination. Ultimately, the ICJ decided that the question did not ask “whether or not the declaration has led to the creation of a State” and instead decided to answer the question on its face: was the declaration illegal? – full stop.<sup>58</sup> The ICJ, it seems, is comfortable with the current legal status of any right of secession – or uncomfortable weighing in on such a potentially contentious issue.

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<sup>54</sup>International Court of Justice, “Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,” The Hague, 22 July 2010.

<sup>55</sup> John Cerone, “The International Court of Justice and the Question of Kosovo’s Independence,” *ILSA Journal of International and Comparative Law* 17:2 (2011); Christian Pippan, “The International Court of Justice’s Advisory Opinion on Kosovo’s declaration of independence: and exercise in the art of silence,” *Europäisches Journal für Minderheitenfragen* 3-4:3 (2010).

<sup>56</sup> Cerone, 342.

<sup>57</sup> Cerone, 342.

<sup>58</sup> ICJ, 424.

The ICJ decided in the Kosovo case that “state practice during this period points clearly to the conclusion that international law contained no prohibition on declarations of independence;” they cited centuries of declarations of independence with no instance of anyone suggesting that such declarations were illegal under international law.<sup>59</sup> Then, the ICJ decides not to answer whether the declaration actually created a new state or not, suggesting that such a question was not part of their interpretation of the General Assembly’s request for an advisory opinion.<sup>60</sup>

Cerone sums the effect of the ICJ’s ruling up nicely: “the Opinion does not in any way support Kosovo statehood. It merely cuts off one possible avenue for arguing that the attempted secession is unlawful.”<sup>61</sup> The lingering effect of the Kosovo decision then was not to clarify this burning question of whether non-states could legally gain real independence, but rather to ask whether they could legally declare it: a difference of independence in practice verses independence in rhetoric. The same author reduces this conclusion to the absurd and points out that, according to the ICJ ruling, his mother is well within her international legal rights to go on international TV and declare her living-room a sovereign nation.<sup>62</sup>

At the end of it all, it seems that there is no right to secession, in international law, for geographically contiguous non-states seeking independence from another nation. While the right to self-determination does still exist, it does not seem to include secession anymore. While declaring independence is not illegal, and achieving independence not impossible, independence is a political and military

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<sup>59</sup> ICJ, 436.

<sup>60</sup> ICJ, 437.

<sup>61</sup> Cerone, 349.

<sup>62</sup> Cerone, 335.

matter, not a legal one. And, it seems doomed to stay that way for the foreseeable future.

### **Concluding Thoughts on Independence in International Law**

While international law has not developed a right to secession outside the context of the break-up of empires and colonialization, I think there are still a couple things in which a search for a right to secession can take solace.

First, while there is not a universal right to secession in any form, recent experience does seem to indicate that the international community supports secession and independence outside of the empire/colonial experience in certain extreme cases of injustice and violence – Kosovo and Bosnia for example. Indicating that, while the international community does not recognize a legal right to secession, it does seem that secession and independence are justified and within the bounds of international law in certain extreme situations. Second, while there is limited recognition of this, there was once an understanding that secession and independence was necessary for a people to fully realize their “economic, social and cultural development.”<sup>63</sup>

These two arguments form the foundation of what will be two separate normative theories of secession, addressed in the following chapter. Maybe, then, the foundation has already been laid for a right to secession in international law.

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<sup>63</sup> UN Covenant on Civil and Political Rights; UN Covenant on Economic, Social, and Cultural Rights.

### **Chapter 3 – Secession in Ethics and IR Theory**

I began by looking at the problem of secession in international politics. I asked three questions. (1) What is the status of a right to secession in international law? (2) What theories of a right to secession have normative IR theorists developed? (3) What should a path forward look like?

Thus far, I have answered the first one. It seems that international law at once says much and little about secession. Over the last century, international law has developed a path to secession and independence through the right to self-determination, while being clear that the inclusion of a path to independence found in self-determination is not universal. More recently, the courts – especially the ICJ – have ruled with increasing adamancy that the universal right to self-determination means non-states have a right to participate in government, thus democratizing self-determination and reinforcing the state system. But still, some states do achieve independence with the backing of the international system. So then, the legal status of independence movements and unilateral declarations of independence seems to be handled on a case-by-case basis, without any sort of go-to rulings or language to be found in broader international law. We further find that one recent secession movement – Kosovo – completely eschewed self-determination and instead chose to make its case for independence based in pragmatism.

Clearly, international law has no single coherent set of rules for creating new nations. But, the international legal system really cannot be blamed; this question is not an easy one. It is one that pits the international system's most central goal – peace – against its most central principle – non-intervention. This is not a problem

that will be easy to solve with consistency in the existing international system. This is perhaps an easier issue for those interested in normative IR theory to resolve.

This brings us to my second question and the question that will guide this chapter: what theories of a right to secession have normative IR theorists developed?

This chapter will seek to answer that question. In what follows, my goal is to delineate the categories and sub-categories of the literature, analyzing and comparing each grouping of scholars. It is not my goal to include everyone who has written on the topic – such aspirations are unrealistic. Rather my goal is to explore and categorize the main points of view while identifying the most significant scholars on the issue of secession.

I have decided to begin with the most progressive set of theories, move through the moderates, and finally into the most conservative: to go from left to right on the ideological scale. In order to do that, I first need to define what I mean by progressive and conservative. Progressive theories are the one least like the status quo. Progressive theories are most supportive of what they suggest is a group's right to secession, arguing that groups have a fundamental right to secession and that secession is necessary for groups to flourish.

More conservative theories are more comfortable with the status quo. Conservative theorists value the stability that the current state system offers. And, while many recognize that secession may be necessary in certain cases, conservative theorists tend to believe that a right to secession actually has the potential to deny important minority groups the rights they enjoy under the current system. I have

included a flow chart in the Appendix that illustrates the positions of each group and their relation to the other groups.

One final note before I begin. In this chapter, unless the author uses the term, I drop the term ‘self-determination’ since – as I established in the preceding chapter – that term no longer is equivalent to ‘independence’ or ‘secession.’

### **Nationalist Theories<sup>64</sup>**

A nationalist theory is any theory of secession that includes a right to secession at some basic level. A specific theory may place limitations on when and who can secede – and indeed, most theories do. But, a nationalist theory allows for a right to secession for *all* who meet the criteria the theory establishes. Within this extremely broad category are two sub-categories, differentiated by limits on when a group can secede: remedial and primary right theories.<sup>65</sup> In keeping with my promise to start with the most ideological progressive, we begin with primary right to secession theories.

To further complicate things, primary right to secession can be broken down into two final sub-categories, differentiated by limits on who has a right to secede: associative and ascriptive theories. Again, starting with the most progressive, I begin with the associative primary right to secession theory, who believe that secession should be open for any group at anytime.

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<sup>64</sup> Over the course of this chapter, I will use a number of borrowed terms. The terms “nationalist” and “statist” are borrowed from Doyle (2010) and the terms “remedial,” “primary,” “associative,” and “ascriptive” are borrowed from Buchanan (various).

<sup>65</sup> Alternately called “just cause” and “choice theory” respectively (Doyle 2010).

Harry Beran articulates one of the clearest examples of this type of theory of secession in a 1984 essay.<sup>66</sup> There, he argues that “secession [should] be permitted if it is effectively desired by a territorial concentrated group within a state and is morally and practically possible.”<sup>67</sup> While Beran does not conclusively delineate what morally and practically possible mean, he does suggest that some important limitations would be appropriate and in his concluding sections, suggests that future research should discuss appropriate limits.<sup>68</sup>

Arguing from a philosophically liberal perspective, and with several nods to Rousseau and Locke, Beran offers three principle justifications for his theory of secession. First is freedom. In liberal society, people voluntarily enter into and terminate all sorts of relationships based on rationality, why should a person’s relationship with the state be any different?<sup>69</sup> Second is sovereignty. In liberal democracies, the individual people are sovereign and the leaders derive their sovereignty from the consent of the governed. Combine that understanding of sovereignty with Beran’s assertion that there is a right to continue to occupy traditional areas and “liberalism must also grant that territorially concentrated groups can exercise their sovereignty...through secession.”<sup>70</sup> Beran’s third and final argument is the principle of majority rule. If a minority is territorially concentrated, it serves the principle of majority rule to release it from the host-state.<sup>71</sup> “To permit

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<sup>66</sup> I note the date here because it is important to note that Beran was writing before the proliferation of essays on secession that surrounded the break-up of the USSR.

<sup>67</sup> Harry Beran, “A Liberal Theory of Secession,” *Political Studies* XXXII (1984): 23.

<sup>68</sup> Beran 1984.

<sup>69</sup> Beran 1984, 25.

<sup>70</sup> Beran 1984, 25-6

<sup>71</sup> Beran 1984, 27.

secession only on moral grounds such as ... right to national self-determination, but not on the ground that it is deeply desired and pursued by adequate political action seems to be incompatible with the arguments from liberty, sovereignty and majority rule.”<sup>72</sup> Here, Beran establishes himself in the associative primary theory camp.

Christopher Wellman is another scholar who is frequently referenced. Like Beran, Wellman argues for an associative primary right to secession.<sup>73</sup> But, just as Beran grounds his theory in liberal democratic ideology, Wellman grounds his theory in a traditional (almost Wilsonian) reading of the principle of self-determination. Wellman argues that self-determination gives a non-state territory the right to independence.<sup>74</sup> He further argues what while a non-state can use the self-determination argument to justify political divorce, the host state cannot use its own right to self-determination to coerce the non-state to remain: self-determination only applies to gaining or maintaining independence, not to preventing a non-state from realizing independence.<sup>75</sup> He goes on, “the right to political self-determination is not absolute, but a group’s right to secede is ordinarily outweighed only if the separatist group is either unable or unwilling to procure the benefits afforded by political society.”<sup>76</sup> Thus, cultural homogeneity plays no role in a non-state’s right to secession, for Wellman: “those nations whose

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<sup>72</sup> Beran 1984, 28.

<sup>73</sup> It is worth noting that Wellman describes himself as occupying a middle ground between nationalist and statist schools. However this may be a rhetorical tool and given the way I am describing the statist school he fits much more squarely where I have put him. Allen Buchanan (1997) supports this categorization of Wellman.

<sup>74</sup> Christopher Wellman, “The Morality of Secession,” in *Secession As an International Phenomenon*, edited by Don Doyle (Athens, GA: The University of Georgia Press, 2010).

<sup>75</sup> Wellman 2010.

<sup>76</sup> Wellman 2010, 22.



claims are legitimate will be justified by political capabilities, *not by their cultural attributes.*"<sup>77</sup>

This general associative point of view seems extremely permissive, but as I hinted, some significant limits do exist. First Beran's theory is probably more permissive than Wellman and it is reasonable to fear that his theory of secession could lead to non-states seceding on a whim; Beran dismisses this, arguing that secession would still be difficult and the ramifications obvious and severe enough to discourage secession without cause.<sup>78</sup> Beran includes a preliminary list of instances when secession would not be appropriate or just. For example, secession should be denied to a non-state who would oppress a minority created by independence.<sup>79</sup> Secession should also be denied to a non-state that is too small to form a functional state or a non-state whose secession would jeopardize the continued existence of the host-state.<sup>80</sup> Wellman similarly suggests some important limitations, but he seems more concerned with the non-state's ability to perform the functions generally required of a state: "when a nation is sufficiently large, wealthy, politically organized, and territorially contiguous, it can secede."<sup>81</sup>

Essentially, any geographically contiguous non-state group, whose departure is fair and just for all involved has a right to secede for this group of perspectives. This perspective may seem extreme, but has more followers than you might expect.

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<sup>77</sup> Wellman 2010, 23. (Emphasis Added)

<sup>78</sup> Beran 1984, 29-30.

<sup>79</sup> Beran 1984, 30-1. The fear Beran is addressing here is that members of the host state's majority ethnic group will find themselves minorities in the newly created nation and could be victimized as an act of retribution.

<sup>80</sup> Beran 1984, 30-1.

<sup>81</sup> Wellman 2010, 22.

For example, this is the only argument that justifies the creation of a new Republic of Texas, meaning that anyone believing Texas has a right to secede holds this perspective at some level. Similarly, this is generally the belief held by Southern secessionists during the American Civil War.

The perspective's progressiveness is also its greatest liability. The international system is slow to adapt and skeptical of major changes. This would be a major change. As Beran himself points out, minority group protection could also be an issue. The other oft-discussed potential issue with which this theory must deal seriously is the issue of regression to the absurd: the fear that smaller and smaller groups secede until a single city block, or even a single household, declares itself a sovereign state. Each author develops unique ways to respond to this issue. But if this theory were incorporated into international law, some rule would need to be developed to address this problem, at least rhetorically.

However, this perspective appeals to many democratic impulses. Even voting in the freest system possible comes with the limitations of that system. Creating a new government however is an exercise in government selection limited only by what is conceivable: the ultimate exercise of political expression. And, allowing any group to create a new government for themselves is the ultimate expression of that ultimate political expression.

This theory has important practical strengths too. However, the practical strengths do not make a whole lot of sense in the vacuum of looking at this single perspective and need to be understood with some context. Therefore, I will save the rest of the discussion of this perspective's strengths for the end of the next theory.

If associative theories of secession occupy the far left end of the ideological continuum, ascriptive theories are just one notch in to the right. Associative and ascriptive theories both fall into the broader heading of primary right to secession, which means that both allow for secession at anytime, for any reason. However, unlike associative theories, ascriptive theories limit that right to identifiable nations with a shared history, culture, or other characteristics that might distinguish nations: the group must constitute a national group. While fewer writers seem to have planted their flag in this area of theory, it nonetheless warrants serious discussion.<sup>82</sup>

Kofman wants to see a fairly permissive right to self-determination, but he fears that the self-imposed limits writers like Wellman and Beran suggest are unrealistic.<sup>83</sup> Unlike theorists belonging to the associative school, who see secession as a natural extension of basic political rights, Kofman sees the right to secession as a way for minority ethnicities to protect themselves from their host-nations. For Kofman, the way state sovereignty works gives states a right to monopolize violence to protect the territorial integrity of the state, which creates incentives to violently put down any sort of nationalist uprising, effectively creating “anti-secessionary wars.”<sup>84</sup> But, establishing secession as a basic human right is too permissive;

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<sup>82</sup> In his summary piece, Buchanan (1997) was only able to come up with one article. It maybe that there are a number of scholars who articulate this position in a secondary or implied way within the bounds of other fields, notably studies of nationalism.

<sup>83</sup> Kofman 1998, 31.

<sup>84</sup> Kofman 1998, 30-1.

instead, Kofman wants to create secession as a *national* right, mitigating the possible chaos created by too many groups seceding too often.<sup>85</sup>

Kofman argues that theorists have thus far been too focused on power as a motive for secession, he notes that some groups want independence despite the obvious power costs. He argues that identity beyond power in the form of often overlooked symbols are important considerations too.<sup>86</sup> He claims that states have a several ways of creating a common national identity, from the mundane like selecting the symbols that appear on currency, flags, seals, and the like, to making decisions about appropriating and excluding cultural elements from a minority group into the national cultural identity.<sup>87</sup> The reason non-state national groups want independence then is because “all groups live in a world of sovereign states, and are affected by this world...if [they are] minorities, then they are necessarily living in the orbit and political space dominated by another group.”<sup>88</sup> So then, the right to secession is an important part of nationalistic group health and expression. But, Kofman is clear, this right is “available only to certain groups having the necessary prerequisites of common historical-cultural identity and territory.”<sup>89</sup>

The most often cited and very carefully argued article for this perspective is Margalit and Raz. They begin by establishing who, they believe, should have a right to secession. They find groups with a legitimate claim to secession must possess six characteristics: (1) common character and culture, (2) practice of the culture makes

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<sup>85</sup> Kofman 1998, 31.

<sup>86</sup> Kofman 1998. He is specifically interested in why Quebec (which he sees as one of the most dominate forces in Canadian politics) is interested in independence.

<sup>87</sup> Kofman 1998, 32-3.

<sup>88</sup> Kofman 1998, 34.

<sup>89</sup> Kofman 1998, 35.

it pervasive, (3) membership is mutually recognized, (4) membership forms an important part of one's self-identification, (5) membership is based on nonvoluntary criteria, and (6) groups are big enough that membership must be based on shared characteristics.<sup>90</sup> Here, Margalitz and Raz clearly lay out what constitutes a national group. While their definition is significantly more thoroughly explored than the one developed by Kofman, both would probably identify a very similar set of groups as qualifying for right to secession. However, unlike Kofman, Margalitz and Raz seem to suggest a slightly more conservative view of when a national group can secede. Margalitz and Raz conclude,

“those who may benefit from self-government cannot insist on it at all costs. Their interests have to be considered along those of others. On the other hand, the interests of members of an encompassing group in the self-respect and prosperity of the group are among the most vital human interests. Given their [group] importance, their satisfaction is justified even at considerable cost to other interests.”<sup>91</sup>

Seeing the potential dangers of the associative theories, ascriptive theorists attempt to address those and other issues with a slightly more limited – though still quite permissive – right to secession. Borrowing heavily from sociology and anthropology, ascriptive theories seek to grant a very permissive right to secession to national groups only. In the American context, Native Americans, Puerto Ricans, and other distinct cultural groups would qualify for a right to secession under for this perspective, but Texas probably would not since it does not have a distinct enough culture.

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<sup>90</sup> Avishai Margalit and Joseph Raz, “National Self-Determination,” *Journal of Philosophy* LXXXVII, no. 9 (September 1990): 443-7.

<sup>91</sup> Margalitz and Raz 1990, 461.

The great strength of this perspective is that it seems to address the ‘regression to the absurd’ problem that associative theories had. Arguing that only identifiable peoples have a right to secession preempts the suburban cul-de-sac that wants to declare its status as a sovereign nation.

I can now return to one more strength of associative theory (a right to secession unlimited by national identities). By ignoring nationality, associative perspectives are, perversely, probably best at preserving national identities. Perspectives that only allow a right to secession for national groups could have two unintended consequences. First, a host state could simply deny that a non-state group seeking secession meets the criteria for a national group. Second, in an effort to prevent future secession, the host state may find subtle ways of undermining the nationalistic identity, resulting in the destruction of the identity the other theories seek to preserve.

### **Remedial Right to Secession<sup>92</sup>**

If there is a middle ground in this discussion between the permissive primary right theories explored above and the restrictive statist theories explored momentarily, it is the remedial right theories. Remedial right theorists argue that non-states can have a right to secession, but only if they have suffered some sort of injustice at the hands of the host state. There are some interesting parallels to the responsibility to protect. Essentially, a non-state only gains access to a right to secession if the host-state forfeits it. In the introduction to this chapter, I suggested that the issue of non-state secession potentially pits the international system’s most

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<sup>92</sup> This category of theories has alternately been called “just cause theory (Doyle 2010).”

central goal – peace – against its most central principle – non-intervention. It seems this perspective tries to achieve both ends.

Allen Buchanan, a long-serving anchor of right to secession theory falls squarely into this category. Buchanan rejects primary-associative rights theories, raising another concern: without a national connection to the territory, a non-national group of people simply lack a claim more convincing than the host-state.<sup>93</sup> He also finds the primary-ascriptive argument unconvincing, this time arguing that there are too many possible nations on earth for each of them to form a viable political community.<sup>94</sup>

What is more satisfying for Buchanan, is a right to secession based on justice (as opposed to liberal political philosophy or nationhood). In his 1991 article, Buchanan raises three possible justifications. First, a non-state has a just claim to seceded if their land was conquered unjustly.<sup>95</sup> Similarly, a non-state has a just cause for secession if they are systemically disadvantaged economically by the host-state.<sup>96</sup> And finally, if the continued existence of the group requires they secede: for example, due to genocide and ethnic cleansing.<sup>97</sup>

Michel Seymour provides a more recent exploration of the issue. His contribution to remedial right theory is the addition of a primary right to internal self-determination. “Minority nations do not have a primary right to external self-determination. They have a right to secede only if the encompassing state fails to

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<sup>93</sup> Allen Buchanan, “Toward a Theory of Secession,” *Ethics* 101, no. 2 (January 1991): 328.

<sup>94</sup> Buchanan 1991, 329.

<sup>95</sup> Buchanan 1991, 329.

<sup>96</sup> Buchanan 1991, 330-1.

<sup>97</sup> Buchanan 1991, 331.

grant them internal self-determination, or if other remedial conditions apply, such as those mentioned by Buchanan.”<sup>98</sup>

Evan Brewer’s theory of secession is also in this remedial framework and one of the few developed after the ICJ’s ruling on Kosovo. Brewer sees an opening in, and builds his theory on, the dissenting opinion in the Kosovo case by ICJ judge Cancado Trindade. The theory Brewer develops includes five criteria. “A group should have a right to secede...where it (1) constitutes a ‘people,’ (2) is governed unequally or subjected to systematic oppression or egregious violations of human or humanitarian rights, (3) is denied any internal realization of self-determination, (4) freely chooses to exercise self-determination externally, and (5) respects *jus cogens* norms and rights of other minorities and has the capacity to ensure such respect in the future.”<sup>99</sup>

A couple things are worth noting from his point-by-point exploration of this theory. The continued reference to self-determination is very interesting. He at once recognizes that self-determination does not mean secession or independence, but simultaneously tries to couch his theory in the same terms.<sup>100</sup> Second, Brewer notes that “systemic...violations of human or humanitarian rights,” could include

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<sup>98</sup> Michel Seymour, “Secession as a Remedial Right,” *Inquiry: An Interdisciplinary Journal of Philosophy* 50 no. 4 (August 2007): 411.

<sup>99</sup> Evan M. Brewer, “To Break Free from Tyranny and Oppression: Proposing a Model for a Remedial Right to Secession in the Wake of the Kosovo Advisory Opinion,” *Vanderbilt Journal of Transnational Law* 45 no. 1 (January 2012): 276. I find his continued use of ‘self-determination’ as a basis interesting given the recent rulings of various international courts.

<sup>100</sup> Brewer (2012) recognizes that self-determination is universal but not equal to independence in on pages 256-60.



“state action, the state’s deliberate failure to act, or action by state proxy.”<sup>101</sup> What is interesting here is the echo of language found in the responsibility to protect. Here the responsibility to protect is expanded to include the potential for a state to completely and permanently lose sovereignty over a territory, if it fails to live up to the responsibilities sovereignty implies. Third, since self-determination really means in international law now was something akin to a right to have a voice in the government; Brewer’s third criterion solidifies and provides for a punishment should a host-state fail to provide for a “right to be taken seriously.”<sup>102</sup> And, it is largely similar to Seymour’s “primary right to internal self-determination.”<sup>103</sup> Finally, for Brewer failure to respect minority rights is enough to void a non-state’s right to secession even if all other conditions have been met.<sup>104</sup>

Perhaps owing to this occupation of the middle ground, there is some debate about where the remedial right theorists fit into the framework of this larger debate. Some try to group remedial right theories in with statist theories. However, I think the difference between creating an automatic and universal right to secession after cases of injustice is importantly distinct from the statist perspective that only recognizes secession on an individual case-by-case basis. I argue that, any theory that creates a general right to secession, regardless of limitations, belongs in the nationalist camp.

It may seem obvious that a non-state group victimized by the host state should have a right to secession. Interestingly, however, creating a remedial right to

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<sup>101</sup> Brewer 2012, 276 & 281.

<sup>102</sup> Klabbers

<sup>103</sup> Seymour 2007, 420.

<sup>104</sup> Brewer 2012, 285.

secession in international law would open secession to a few groups who currently do not have it. If we allow non-states who have been victims of genocide to secede, a right to secession opens for Darfur in Sudan and the Tutsis of Rwanda. If we include lands unjustly taken, a right to secession must also open for Tibet.

The remedial nature of this conception of a right to secession probably makes it more palatable to the current state system. Just as most Western societies remove children from abusive parents, it is easy to find agreement – at least among the Western powers – that we should remove non-states from abusive host states. This perspective is also more palatable for the current system because it preserves the current system for states that are just.

However, I think there is a danger here too. First, the international community is already sufficiently incentivized to avoid applying labels like “genocide” and “ethnic cleansing” to crises. Adding an explicit right to secession to those labels could mean a total elimination of ‘genocide’ and ‘ethnic cleansing’ as global problem that states recognize. Second, it is disconcerting that activation of the right to secession in remedial theories requires death, suffering, and acts of violence. It seems borderline hypocritical: why should a right aimed at preventing death and violence against minorities require death and violence against the same minorities to activate? By the time we get to that point, the situation has escalated to a point from which it is incredibly difficult to return. Third, the obvious question – what types of injustice and what are the relevant thresholds – are not really addressed in serious detail in any of the remedial rights literature I read. Fourth

and finally, it is theoretically possible to provoke acts of egregious injustice against yourself, especially if the threshold is set low.<sup>105</sup>

The addition of a right to secession for non-states whose land was inappropriately appropriated is also problematic. First, when does a claim that land unjustly taken justifies a right to secession expire? Do the Cherokee still have a right to reclaim their traditional homelands on the eastern seaboard and form an independent state, displacing millions of people who have lived there for generations? Second, inclusion of lands unjustly taken is problematic because many nations who take lands believe they have an historic or cultural right to the lands in question. For example, Palestinians could argue that they were unjustly forced off their land by the creation of Israel and the Israelis could counter that they have a cultural and historic right to same land.

### **Statist**

Statists worry about the impact of establishing a permanent, universal right to secession. They raise a number of issues related to the territorial integrity of the “host state” and the rights of the host state and its people. However, statisticians also recognize that “no” is not a satisfying response to secession movements and statisticians tend to suggest that host states try to democratize and find new ways to give voice – and perhaps some limited autonomy within the context of the existing state – to the non-state groups. To be clear, I am not trying to suggest that statisticians emphatically deny that secession is sometimes justified, such a claim would grossly misrepresent the perspective. Rather statisticians do not want to see the creation of any sort of right

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<sup>105</sup> Donald L. Horowitz, “The Cracked Foundations of the Right to Secede,” *Journal of Democracy* 14.2 (2003): 6.

to secession that is not case-specific: that is, while the secession of a non-state is sometimes just and unavoidable, the international system should not reform to incorporate an automatic and universal right to secession. As a point of reference, the statist perspective is broadly the perspective that has been adopted by the ICJ and other international courts and is generally the policy of states themselves.<sup>106</sup>

Aside from the obvious ‘maintenance of territorial integrity’ argument, other arguments are also available. Statists, raise a number of issues to respond to nationalists’ calls for broader rights to secede. Here, I am going to identify just a couple of the most compelling ones.

The first is well summarized by Jan Klabbbers. While he is primarily concerned with the status and evolution of self-determination *in* international law, he is speaking largely of a self-determination that has historically been tied to secession. He highlights an important issue at the end of his piece. “Self-determination has always been plagued by the problem that a decision in favor of the right to self-determination [by the courts] (where this would imply secession, at any rate) of one group automatically entails a denial of the same right to another group.”<sup>107</sup> That is, by granting sovereignty to a non-state, you necessarily restrict the host state’s right to sovereignty, a key part of their statehood.

Ultimately, Klabbbers envisions self-determination ceasing to mean something akin to secession and instead coming to mean something like ‘political representation.’ If all non-state groups have political representation, there will be no need – in Klabbbers’s assessment – for a full right to secession and independence.

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<sup>106</sup> Seymour 2007, 399.

<sup>107</sup> Klabbbers, 190

What these non-states really want is political voice, and currently they feel that the only way to achieve that is through independence.

In an article for the *Journal of Democracy*, Donald Horowitz offers several important cautions indicative of the statist perspective. First, he reiterates a point made throughout the literature, that secession does not necessarily create a single unified nation-state. Like several other theorists, Horowitz worries about minority protection in the new state, especially members of the majority national group in the host-state who are now minorities in the new state. Horowitz is less optimistic that minority protections can be guaranteed and points out the very real possibility of retributive actions.<sup>108</sup>

Second, Horowitz also points out the possibility that the old tensions will not go away after secession and independence, making what was formerly an intrastate conflict into an interstate conflict.<sup>109</sup> If intrastate conflicts have the potential to destabilize a region, interstate conflicts have even greater potential to further destabilize a region.

Finally, Horowitz rejects remedial theories explicitly. He argues that creating an automatic right to secession in the case of injustice will only create more injustice, not prevent future injustice: "If independence can only be won legitimately after matters have been carried to extremes, then, by all means, there are people willing to carry them to extremes."<sup>110</sup> To be clear, Horowitz is not suggesting secession is never justified: "in those rare cases in which separation of antagonists

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<sup>108</sup> Horowitz, 3-4.

<sup>109</sup> Horowitz 2003, 4.

<sup>110</sup> Horowitz 2003, 6.

is, at the end of the day, the best course, partition can be accomplished reluctantly...without recognizing a *right* to secede.”<sup>111</sup> Rather, he – summing up the statist perspective nicely – fears the consequences of making secession an automatic and universal right in any situation.

Unlike the other perspectives, statist theories do not add a right to secession and thus no non-state groups gain a right to secession. However, statist perspectives do offer some advantages relative to the other theories. First, if statist theory (especially Klabber’s ‘right to be heard’) is applied fully, it could have a democratizing effect on the world as states are forced to democratize in order for their minorities to more fully realize their right to internal self-determination. If non-states were allowed a right to leave, the host state would not democratize and its own citizen would get no benefit out of the departure of the non-state group. Second, in the primary right theories especially, non-states who choose to remain attached to the host state acquire a lot of power over the host state. If the host state wants to hang onto the non-state group (and in many cases they would) it would be possible for the non-state to leverage that desire into undue power over the host state. Resulting in a tyranny of the minority and effectively eliminating any democratizing effect. Finally, the statist perspective does not require any additions, reinterpreting, or rewriting of international law.

However, the statist perspective leaves the issues I began with largely unaddressed. Groups seeking independence, sovereignty, and statehood are still left with only a few ways to achieve that goal, many with very negative consequences.

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<sup>111</sup> Horowitz 2003, 2. Emphasis added.

And, by relying on the international system to determine who is afforded statehood and who is not, states effectively leave the decision up to a few great powers.

## **Conclusion**

In this chapter, I have tried to answer the second of my three questions: what theories of a right to secession have normative IR theorists developed? Essentially, I have found four separate and distinct categories of perspectives. First, are the associative primary right to secession theories. These theorists argue that there needs to be a universal right to secession that is not predicated on suffering previous injustice, or even constituting a minority ethnic group distinct from the majority ethnic group of the host state. A group of people, being reasonably large, should have a right to secede at any time for any reason because people have a basic right to establish (determine) their government and in so doing give it authority.

Next, I looked at ascriptive primary right theories. They agree that there needs to be a universal right to secession that is not predicated on suffering previous injustice. However, these theorists break with associative theorists and argue that the non-state group at least should constitute an ethno-nationalistic group that is distinct from the majority ethno-nationalistic group of the host state. A group of people, being reasonably large and sharing a common identity, should have a right to secede at any time for any reason because such a right (even if unpracticed) is an important part of preserving and cementing national identity.

Third, I looked at remedial right theorists. They reject the idea of a universal right to secession that is not predicated on the host state forfeiting their claim to the non-state's territory through unjust actions. For remedial right theories a group of

people, having earned a right to independence through the forfeiture (through some form of gross injustice) of the host state's authority over them, should have a right to secede as a part of the group's ultimate preservation and continued existence.

Finally, I looked at the statist perspective. Statists reject the idea that there is a need for any sort or *right* to secession – primary, remedial, or otherwise. They argue that creating such a right is dangerous and the international community should only grant independence sparingly and on a case-by-case basis. While secession may be just and necessary, creating a right to it is unfair and dangerous.



## **Chapter 4 – Toward a Solution**

This thesis has been a search for a right to secession. I began by setting up modern secession in the histories of the American Revolution and American Civil War. I noted the hypocrisy of arguing that there is a fundamental right to secession in one case but not the other. Extrapolating from there, I pointed out that this hypocrisy is still around today. Referencing civil war, genocide, refugees, humanitarian interventions, and the struggle, loss of life, and violence that often results from secessionary struggles, I made the case that this is an international issue.

In the second chapter, I asked what the status of a right to secession in international law was. I pointed out that even though much international law is only concerned with state interaction, some extant international law does deal with state/citizen interaction and some more recent developments have changed the nature of international legal personhood to include individuals. I reminded the reader of the potential consequences of a people's search for independence and pointed out that there seem to be a limited number of ways a state can acquire independence in international law. Then, after defining self-determination as the idea that people should be able to 'determine' their government and differentiating 'internal' and 'external' self-determination, I explored the history and evolution of self-determination in international law.

I began after World War One where self-determination was used rhetorically to break-up the Ottoman and Austro-Hungarian Empires. I explored the inclusion of self-determination in UN documents following World War Two and I explained how

the idea of self-determination was used to free the colonies and create new nations all over the world. Next, I looked at self-determination in the post colonial era and argued that recent rulings by various international courts has, once more reconceptualized self-determination, but not as a right to independence for a specific group. Rather, in the modern context self-determination is more limited to its internal definition: a right of a people to participate in the political process of their host state. I illustrated that point with the Kosovo declaration of independence, which does not use arguments traditionally associated with self-determination. Finally, I noticed two international law contributions to normative IR theory: special cases do still merit secession and independence and the rhetoric of the UN suggests that independence is necessary for a culture to truly realize their economic, social, and cultural potential.

In my third chapter, I tried to answer the question, what theories of a right to secession have normative international relations theorists developed. I began with the most permissive theories. Associative primary right theories argue that any non-state group should have a right to secession at any time and for any reason regardless of whether the members share an ethno-national identity, arguing the right to choose your government is a basic right. Ascriptive primary right theorists also argue that there should be a universal right to secession at any time and for any reason but limit that right to established ethno-national groups, arguing that the right to independence is an important part of flourishing for an ethno-national group. Remedial right theorists argue that there should be an automatic right to secession but that the right to secession should only activate if the non-state group

has suffered some sort of egregious human rights violation, arguing that just states' right to sovereignty and territorial integrity should not be broken on a whim.

Finally, I pointed out that there were also scholars making normative arguments for what is roughly the status quo, arguing that a right to secession has the potential to destabilize the system, undermine the rights of minorities, and violate the rights of state.

I believe that I have contributed three things with this project. To my knowledge no other work has tackled this issue in the interdisciplinary way that I have tried here. I have tried to bring together perspectives from international law scholarship and normative IR theorists. Second, I have organized the literature in normative IR theory in a way that I believe to be fair and free of unchecked bias. Finally, I added a few of my own thoughts to the debate. In the normative theory chapter, I added possible case examples for each normative perspective and a few critiques to the various theories that I did not encounter in my research, but that I felt were relevant, nevertheless. And, I now turn my attention to the second part of that third contribution.

### **Why a Right to Secession Now?**

I believe that a right to secession needs to be created. And, I believe that the time is ripe for a renewed discussion concerning what a right to secession should or should not be and mean.

While large blocks of captive nations no longer exist, there are still a number of ongoing secession movements. In one article, Harry Beran calls secession a "neglected philosophical problem" and as evidence provides examples of ongoing

secession conflicts contemporary to that 1984 article. His examples are “Quebeckers, Croatians, Scots and Welsh, Corsicans and Bretons, the Basques of Spain and France, the Somalis of Kenya and Ethiopia, the Kurds of Iran, Iraq Turkey, and Syria, or the Nagas and Mizos of India.”<sup>112</sup> Most of those ten examples are still in search of a meaningful, long-term solution. In the United States alone a Google.com search reveals that there are six notable ongoing secession movements – seven if you count the independence movement in Puerto Rico.<sup>113</sup> While many of these conflicts are in a state of detente, elements in each of these movements remain committed to secession and independent statehood. While it is fair to argue that it is no current crisis of secession, it is still a relevant issue. The obvious question now is why should we be discussing this now?

It seems that this is a topic that only really gets discussed in the light of some secession emergency. At least in the field of normative IR theory, it seems that most of the relevant scholars developed their positions in an atmosphere of secession crises: first by the break-up of the USSR then by the break up of Yugoslavia. Now, we have an opportunity to develop a theory without the influence of an imminent, destructive push for independence. New theories developed now will likely have a stronger claim to being unbiased and unaffected by current crises.

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<sup>112</sup> Beran 1984, 21.

<sup>113</sup> Alaskan Independence Party < <http://www.akip.org/>>, Cascadian Independence Project (Consisting of Oregon, Washington, & British Columbia) < <http://www.cascadianow.org/>>, The Republic of Lakotah < <http://www.republicoflakotah.com/>>, The League of the South < <http://dixienet.org/rights/2012/index.php>>, Texas Nationalist Movements et al. < <http://texnat.org/intro-to-tnm/about-tnm>>, and The Second Vermont Republic < <http://vermontrepublic.org/>>.

## Concluding Thoughts

Without a right to secession, non-state groups seeking independence have only history as a guide for achieving independence. History shows just four widely available paths to independence. (1) Non-state groups can fight for it. (2) Non-state groups can be freed colonies. (3) Non-state groups can be part of a multi-group empire in the process of implosion. (4) Or, non-state groups can be lucky enough to have powerful state view their creation as politically expedient. For most groups, the only real option is the first one. Having a process in place whereby non-state groups can work for secession peacefully and productively has a chance of greatly reducing violence when the next non-state group begins its push for independence.

To that list, remedial right theorists would add a fifth path: non-states can achieve independence by suffering egregiously under the host state. This path does not strike me as being much better than the first one.

While I agree that groups who are victimized by their host state should have a right to secession, I find remedial right theories lacking in four key ways, as I pointed out earlier. First, the international community is already sufficiently incentivized to avoid applying labels to crises, tying a right to secession to terms like “genocide” and “ethnic cleansing” would only serve to cause states to use the terms less, which could deny victim groups the other aid that goes along with those terms. Second, the fact that activation of the right to secession in remedial theories requires death, suffering, and acts of violence is disconcerting for me. Finally, it is theoretically possible to provoke acts of egregious injustice against yourself. Especially if the threshold is set low.

I am similarly not convinced of the superiority of the ascriptive right to secession. The process of defining what a 'nation' is and is not simply seems too subjective to me. Clearly the French and German are separate peoples who should have rights to separate nations. But, are Texans and Oklahomans distinct enough to justify the secession of one? Surely many Texans would say that they are, but many Texans would declare 'American' their nationality. What differentiates nationalities? Additionally, as I pointed out earlier, I see the possibility that an ascriptive right could incentivize host states to subtly and quietly subvert minority cultures in an effort to de-legitimize their claims to secession later.

I feel myself morally drawn to an associative primary right to independence: the right to secession equivalent of a 'no-fault divorce.' I am drawn by the liberal arguments expressed the American Declaration of Independence (referenced in the opening chapter) and re-developed by Harry Beran and Christopher Wellman. And, this perspective should not be unpalatable for Americans, as our own revolution arguably falls into this category.

I ultimately believe that a single person cannot draft a complete right to secession. What I would suggest is a committee along the lines of the International Commission on Intervention and State Sovereignty, where committee members are selected from a broad range of countries and backgrounds, where meetings are conducted around the world to gather the greatest and most diverse points of view possible. So, while I recognize this is not the place to sketch out a complete treatise on the right to secession, I do feel that an outline might not be completely out of line.

I begin by suggesting the creation of permanent, non-partisan international body tasked with overseeing the process of secession, perhaps an added arm of an existing organization like the United Nations

I base my right to secession in the classic Lockean ideal of “rule by the consent of the governed.” As such, I agree with Beran and others that people living within the bounds of a proposed new nation should have the right to vote on the new state. The vote should be administered by a commonly agreed third party and the vote required for secession should be a high qualified majority – I would suggest perhaps as high as 80 or 90 percent in favor for the measure to pass.

The logical concern – it is raised by many writers on this subject – is that an open right to secession like this could lead to the secession of states no bigger than a city block. Like Beran, I counter that while some zealous people may try to create a nation of their block, the overwhelming ramifications and logistical challenges of setting up a new nation would deter all but the most serious and prepared groups from working towards secession. The zealous would be further hampered by national identity. While an associative right theoretically allows people to secede who may not share an ethno-nationalist identity, or who may all share their ethno-nationalist identity with the greater host state, it would be extremely difficult to convince a group of people to abandon a state that shares their national identity and is functioning well on a poorly designed whim. Texas provides a good example. Texas has a high level of nationalism, a fairly large territory and population, and a

GDP in excess of a trillion dollars.<sup>114</sup> However, only “18 percent of Texans would vote to secede from the U.S. if given a choice. Three-fourths of Texas citizens said they oppose secession.”<sup>115</sup>

In addition to ensuring the seriousness of the applicant for secession, the high-threshold qualified majority required could also encourage gerrymandering of the nation-to-be. When trying to divide a territory into several groups where the stakes are a simple majority, gerrymandering can have serious negative consequences. However, in this situation, gerrymandering is likely to be beneficial. Rather than drawing the lines around as much land and other desirable objects as possible, the non-state group would be forced to draw the lines in such a way so as to include people who want to be part of the new nation while leaving people who want to remain in the host nation alone.

Next, like many others who have written on this topic, I worry about minority protection. It is nearly impossible to draw borders without minority groups. As we have seen – most recently in Kosovo and Bosnia – there is a real chance the victims of injustice in the old state can become the victimizers in the new state. But, another strength I see in primary right theories is that the level of animosity between groups has a legitimate chance of staying low because the situation may never devolved into violence. Still, feelings of anger and vengeance

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<sup>114</sup> “America's Fiscal Union: the Red and the Black,” *Economist Online*, August 1, 2011. <<http://www.economist.com/blogs/dailychart/2011/08/americas-fiscal-union>> (last accessed April 12, 2013).

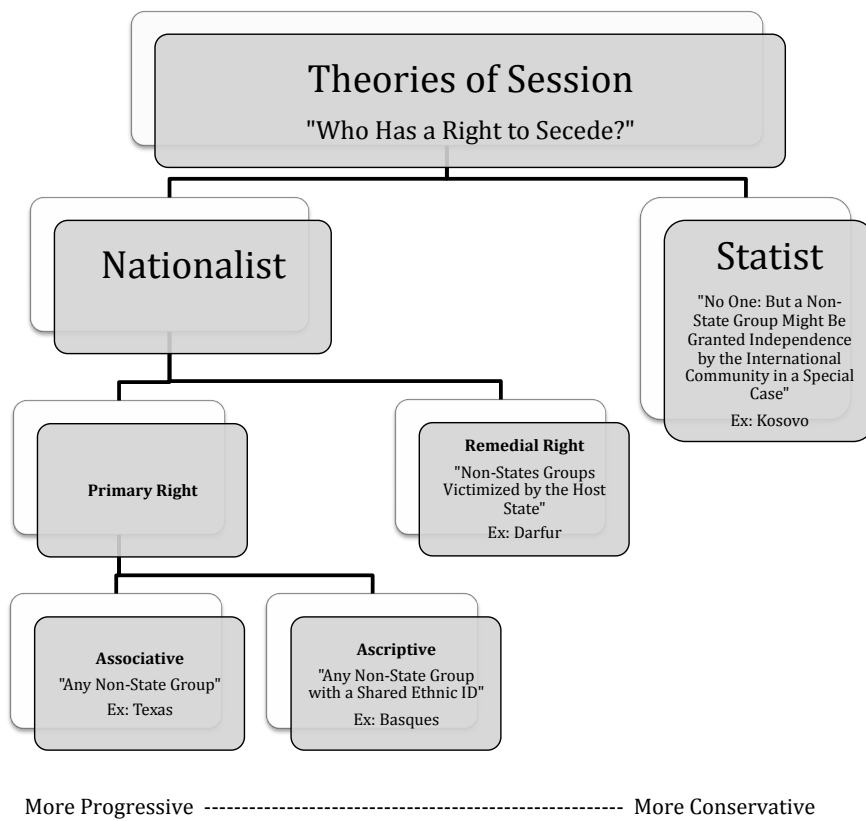
<sup>115</sup> “Some Facts and Fiction for Texans Who Want State to Secede from U.S.,” *Dallas Morning News*, November 13, 2012, <http://www.dallasnews.com/news/state/headlines/20121113-some-facts-and-fiction-for-texans-who-want-state-to-secede-from-u.s..ece> (last accessed April 12, 2013).



are likely to still be factors, even in amicable secession. As such, some sort of conflict and violence mediation should be required of the groups and individuals involved. Where injustice was a key factor in the split, a la “Truth and Reconciliation Committees;” where injustice was not a serious factor, perhaps something as simple as regular structured talks between leaders. The new nation and its former host state will at the very least be neighbors, but will likely remain important partners for each other.

I see a need for a codified right to secession in international politics. International law has been unable to develop a universal right to secession on any sort of lasting basis or criteria. And, while scholars have explored a number of visions for what secession might look like, the one that is the most convincing for me is also the most permissive. For this issue to be solved in a lasting and meaningful way, we need to establish a guided associative primary right to secession.

## Appendix



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